

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: April 13, 2006

Resolution No. L-329

RESOLUTION

**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION
CONSUMER PROTECTION AND SAFETY DIVISION (RAIL
TRANSIT AND CROSSINGS SAFETY BRANCH) INVESTIGATION
RECORDS, PURSUANT TO A SUBPOENA OF THE NATIONAL
RAILROAD CORPORATION, SEEKING DISCLOSURE OF
COMMISSION RECORDS RELATING TO A PRIVATE
RAILROAD CROSSING IN THE CITY OF CROCKETT (CONTRA
COSTA COUNTY, CA)**

BACKGROUND

The National Railroad Corporation (also known as Amtrak) issued a subpoena for records of the California Public Utilities Commission (Commission) for “any and all documents regarding the United States Department of Transportation Railroad Crossing Number 751707C, in the City of Crockett, Contra Costa County, CA.” Such files include the Commission’s investigation of a fatal accident that occurred on May 31, 2003, when the vehicle of Mr. and Mrs. Bennie T. Murillo was hit by an Amtrak train at a private railroad crossing (DOT 751707C). The accident occurred when Mr. and Mrs. Murillo’s vehicle stopped on the tracks between the crossing gates.

On July 15, 2005, Commission staff advised Amtrak, through Qwest Discovery Services, that staff could not disclose the investigative records in the absence of authorization by the Commission. General Order (G.O.) 66-C, the Commission’s guideline for public access to Commission records, provides in § 1.1 that Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule.” G.O. 66-C § 2.2 precludes staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.” Section 2.2 (a) covers information provided by Amtrak

employees to Commission staff in the course of staff's investigation, as well as Commission-generated records containing this information.

Although G.O. 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, section 3.4 of the G.O. permits those denied access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission's response to the subpoena served by Amtrak.

DISCUSSION

The Code of Civil Procedure provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code of Civil Procedure § 2017 (a).)

Evidence Code § 911 provides that: "Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing. (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing." Thus, as a general rule, where state evidence law applies, a government agency's justification for withholding information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute prohibiting disclosure of the Commission's incident investigation records. The potentially applicable statutory restrictions on disclosure applicable here relate to "official information" obtained in confidence by a public employee in the course of his duties that has not been open or officially disclosed to the public (Evidence Code § 1040 (a)) and "personal information" pursuant to the Information Practices Act (IPA) (Civil Code § 1798, et seq.).

Official Information

The records include information provided by Amtrak employees related to the incident. Because there is no statute prohibiting disclosure of the Commission's incident investigation records, the official information privilege is not absolute, and the Commission has discretion whether to exercise the privilege. (Evidence Code § 1040 (b).) During the past twelve years, the Commission has ordered disclosure of records and information concerning completed incident investigations on numerous occasions. The Commission has found that such disclosure will not interfere with

the Commission's investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the incident.¹

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with staff's ability to complete its incident investigation responsibilities.

Personal Information

The IPA is generally intended to restrict disclosure of information that it is not otherwise public that is obtained from "personal information" maintained in the records of a state agency, and prohibits disclosure of "personal information in a manner that would link the information to the individual to whom it pertains." (Civil Code §§ 1798.24.) The IPA defines "personal information" as:

any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual. (Civil Code § 1798.3(a).)

The "personal information" in the records subpoenaed here consists of the names of Commission staff and Amtrak employees, statements attributed to Amtrak employees, and an individual's Social Security Number. The Social Security Number will be redacted prior to disclosure of the records. Most of the remaining information is not restricted from disclosure because: (1) it is otherwise public; (2) it does not link the individual with other "personal information" in the records; or (3) by service of this resolution, the Commission made a reasonable attempt pursuant to Civil Code § 1798.24(k) to provide notice that "personal information" will be disclosed.

Testimony of Commission Employees

We strongly discourage litigants from seeking the testimony of Commission employees regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since staff must adjust normal

¹ See, e.g. Commission Resolution L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.93-05-020 (1993), 49 CPUC 2d 241.

workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority.

COMMENTS ON DRAFT RESOLUTION

Public Utilities Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and subject to at least 30 days public review and comment before the Commission may vote on them. Section 311 (g)(3) and Rule 77.7(f)(7) of the Commission's Rules of Practice and Procedure provide that the Commission may reduce or waive the period for public review and comment regarding decisions authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena. The comment period is being waived under this authority.

FINDINGS OF FACT

1. The Commission received a subpoena from Amtrak seeking Commission files relating to a railroad crossing (U.S. Department of Transportation number 751707C) in the City of Crocket (Contra Costa County, CA). The authorized contacts for Amtrak are Quest Discovery Services and the law firm of Lombardi, Loper & Conant, LLP. Such files include the Commission's investigation of a fatal accident on May 31, 2003, when the vehicle of Mr. Bennie T. Murillo stopped on the tracks and was hit by an Amtrak train.
2. Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records and information will not interfere with staff's ability to complete its incident investigation responsibilities.
3. The subpoenaed records include "personal information" in the form of references to the names of individuals, including Commission staff involved in reporting and investigating the incident, the identities of Amtrak employees and their statements related to the incident, and the Social Security Number of one individual.
4. The draft resolution was served on Amtrak and counsel for Mr. Bennie T. Murillo on March 13, 2006.

5. The public interest favors disclosure of the requested investigation records with redaction of the Social Security Number.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon a statutory prohibition, privilege, or other protection against disclosure. (Evidence Code § 911.)
2. The Commission has, through G.O. 66-C § 2.2(a), limited staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. G.O. 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The public interest in nondisclosure of records concerning the May 31, 2003 accident at a railroad crossing (DOT number 751707C) in the City of Crockett does not outweigh the necessity for disclosure in the interest of justice.
4. The subpoenaed records include "personal information" protected by the Information Practices Act (IPA). (Civil Code § 1798, et seq.)
5. With the exception of a Social Security number, which will be redacted, the service of this resolution provides notice that the records include "personal information" related to employees of Amtrak and constitutes a reasonable attempt to provide notice pursuant to Civil Code § 1798.24(k).
6. The names of Commission staff, other government employees and employees of Amtrak are not "personal information" restricted from disclosure by the IPA if the information is otherwise public information or does not link the individual to any other "personal information" pertaining to that individual in the records.

ORDER

1. Subject to the redaction of "personal information" that (1) is not public information; or (2) links an individual to any other "personal information" pertaining to that individual in the records, the Commission's records concerning an accident that occurred on May 31, 2003 at DOT crossing number 751707C in the City of Crockett (Contra Costa County, CA), and the

investigation of that accident, shall be disclosed in response to the subpoena served on behalf of Amtrak.

2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of April 13, 2006 and that the following Commissioners approved it:

STEVE LARSON
Executive Director

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners